APPENDIX

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 19-3632

Charles Ahumada

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the District of North Dakota - Bismarck

Submitted: February 17, 2021
Filed: April 22, 2021

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

BENTON, Circuit Judge.

Charles Ahumada was convicted of two drug crimes. Under the Criminal Justice Act (CJA), this court appointed Kent M. Morrow to represent him on appeal. This court affirmed. ***United States v. Ahumada***, 858 F.3d 1138, 1139 (8th Cir. 2017). This court alerted Morrow to the 14-day deadline for petitions for rehearing. Morrow failed to notify Ahumada until after the deadline passed. Morrow did not explain the rehearing process. Ahumada filed a pro se motion to extend the filing

deadline. This court granted the motion and recalled the mandate. Ahumada submitted his petition, after the new deadline. This court denied it.

Ahumada filed a pro se motion to vacate under 28 U.S.C. § 2255. He claimed Morrow abandoned him by failing to communicate and provide requested documents. The district court[1] denied his motion but issued a certificate of appealability on Ahumada's right to counsel for a petition for rehearing. ***United States v. Ahumada***, 1:15-cr-00044-DLH-2, Docket No. 133, at 12-18 (D.N.D. Nov. 20, 2019).

"This court reviews de novo the district court's legal determinations, and for clear error its findings of fact." ***Dilang Dat v. United States***, 983 F.3d 1045, 1047 (8th Cir. 2020).

"[T]he Fifth Amendment due process clause governs the right to counsel for appellate proceedings." ***Steele v. United States***, 518 F.3d 986, 988 (8th Cir. 2008), *citing* ***Ross v. Moffitt***, 417 U.S. 600, 610-11 (1974). A criminal defendant has a constitutional right to counsel on the first direct appeal. ***Id.***, *citing* ***Douglas v. California***, 372 U.S. 353, 357-58 (1963). This "encompasses the right to effective assistance of counsel." ***Id.***, *citing* ***Evitts v. Lucey***, 469 U.S. 387, 396-400 (1985).

Distinct from a first direct appeal, a petition for rehearing is a discretionary appeal. *See* **Fed. R. App. P. 40(a)(4)** ("*If* a petition for panel rehearing is granted . . . ." (emphasis added)). "*En banc* review, like the Supreme Court's *certiorari* jurisdiction, is discretionary." ***United States v. Dunlap***, 936 F.3d 821, 824 (8th Cir. 2019). *See generally* ***Jackson v. Johnson***, 217 F.3d 360, 364-65 (5th Cir. 2000) (petition for rehearing is discretionary); ***United States v. Coney***, 120 F.3d 26, 28 (3d Cir. 1997) (same); ***McNeal v. United States***, 54 F.3d 776, *2 (6th Cir. 1995) (unpublished table order) (same). *Cf.* ***Nichols v. United States***, 563 F.3d 240,

[1]The Honorable Daniel L. Hovland, United States District Judge for the District of North Dakota.

252 (6th Cir. 2009) (declining to decide whether a petition for rehearing is a first-tier appeal or a separate review).

There is no constitutional right to counsel for discretionary appeals. ***Austin v. United States***, 513 U.S. 5, 8 (1994) (per curiam), *citing* ***Ross***, 417 U.S. at 616-17. A defendant without a constitutional right to counsel "cannot be deprived of the effective assistance of counsel." ***Steele***, 518 F.3d at 988 (addressing right to counsel for certiorari petition), *quoting* ***Wainwright v. Torna***, 455 U.S. 586, 587-88 (1982) (internal quotations omitted). Because Ahumada has no constitutional right to rehearing counsel, he cannot claim ineffective assistance of counsel.

He argues the CJA, this circuit's CJA plan, or Federal Rule of Criminal Procedure 44(a) grant the right to effective assistance of counsel for petitions for rehearing. *See* **18 U.S.C. § 3006A(c)** (appointed counsel shall represent defendant "at every stage of the proceedings from his initial appearance . . . through appeal, including ancillary matters"); **Fed. R. Crim. P. 44(a)** (a defendant is entitled to counsel "at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right"); REVISION OF PART V OF THE EIGHTH CIRCUIT PLAN TO IMPLEMENT THE CRIMINAL JUSTICE ACT OF 1964, https://ecf.ca8.uscourts.gov/newrules/coa/Plan_V_Revision.pdf (last visited Apr. 19, 2021) (counsel "must" file petition for rehearing if defendant requests it and there are reasonable grounds to do so). While these "may well embody the congressional judgment as to what representation to afford defendants, [they are] not a statement of what the Constitution requires." *See* ***Steele***, 518 F.3d at 988; ***Walker v. United States***, 810 F.3d 568, 576 (8th Cir. 2016) (following *Steele*). *Cf.* ***Pennsylvania v. Finley***, 481 U.S. 551, 556 (1987) ("Respondent apparently believes that a 'right to counsel' can have only one meaning, no matter what the source of that right. . . . Rather, it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question.").

"The alleged breach of the provisions of our [CJA] plan and Rule 44(a) did not deprive [the defendant] of due process of law and did not give rise to a claim for

ineffective representation of counsel." ***Steele***, 518 F.3d at 988. A constitutional right is required before Ahumada can be deprived of ineffective representation of counsel. *See* ***id.*** Even assuming there was a breach of the statute, the CJA, it does not give rise to a claim for ineffective representation of counsel. *Compare* ***Jackson***, 217 F.3d at 364-65 (no constitutional right to counsel for petition for rehearing); ***McNeal***, 54 F.3d at 776, *2 (same), *with* ***Taylor v. United States***, 822 F.3d 84, 90 (2d Cir. 2016) (holding "that the CJA entitles defendants to representation in filing non-frivolous petitions for rehearing and rehearing *en banc*," but not addressing constitutional grounds); ***United States v. Howell***, 37 F.3d 1207, 1209 (7th Cir. 1994) (the CJA, CJA plan, and Rule 44 "make it clear that the defendant in a direct criminal appeal has the right to have the continued representation of appointed counsel throughout the course of the appeal, including the filing of post-opinion pleadings in the court of appeals"), *citing* ***Wilkins v. United States***, 441 U.S. 468, 470 (1979) (per curiam) (explaining that appointed counsel's failure to file certiorari petition violated Third Circuit's CJA plan, but not addressing constitutional grounds); ***Doherty v. United States***, 404 U.S. 28, 29 (1971) (per curiam) (remanding to appellate court to consider defendant's statutory right to counsel under CJA when filing a petition for writ of certiorari); ***Schreiner v. United States***, 404 U.S. 67, 67 (1971) (per curiam) (same).

The district court properly denied Ahumada's § 2255 motion.

* * * * * * *

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America, Plaintiff, vs. Charles Ahumada, Defendant.	)	**ORDER DENYING DEFENDANT'S MOTION FOR HABEAS RELIEF** Case No. 1:15-cr-044
Charles Ahumada, Petitioner, vs. United States of America, Respondent.	)	Case No. 1:18-cv-183

Before the Court is Defendant Charles Ahumada's Motion to Vacate under 28 U.S.C. § 2255 filed on September 7, 2018. See Doc. No. 125. The Government filed a response in opposition to the motion on November 23, 2018. See Doc. No. 129. Ahumada filed a reply on January 28, 2019. See Doc. No. 132. For the reasons outlined below, the motion is denied.

I. BACKGROUND

On March 4, 2015, Ahumada was charged, along with a co-defendant, in a two-count indictment with the crimes of conspiracy to possess with intent to distribute and distribute a controlled substance (heroin) in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. §2 (Count One) and of possession with intent to distribute a controlled substance (heroin) in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count Two). See Doc. No. 1. On May 7, 2015, Ahumada filed a

motion to suppress evidence, challening the search and seizure resulting from a traffic stop. See Doc. No. 36. The Court held a hearing and issued an order denying the motion to suppress. See Doc. No. 52.

Ahumada proceeded to trial and was found guilty of both counts, on October 8, 2015. See Doc. No. 66. On February 3, 2016, Ahumada was sentenced to 156 months imprisonment. See Doc. No. 106. He timely appealed to the Eighth Circuit Court of Appeals on February 4, 2016. See Doc. No. 108. The Eighth Circuit Court of Appeals dismissed his appeal on June 5, 2017, and issued a mandate on June 17, 2017. See Doc. Nos. 117 and 118.

On July 10, 2017, Ahumada filed a *pro se* motion for an extension of time to file a motion for rehearing or rehearing *en banc*. See Doc. No. 125-3, pp. 1-4. The Eighth Circuit granted the motion and recalled its mandate. See Doc. No. 125-5. Ahumada was given until July 19, 2017, to file his petition for rehearing. See Doc. No. 125-5. Ahumada did not file his petition for rehearing until July 25, 2017. See Doc. No. 129-1. On August 15, 2017, the Eighth Circuit Court of Appeals dismissed his petition for rehearing as untimely, and denied his petition for rehearing. See Doc. No. 125-6. Mandate was reissued on August 23, 2017. See Doc. No. 125-6.

On September 7, 2018, Ahumada filed the instant motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. See Doc. No.125. In his petition, Ahumada claims ineffective assistance of counsel and sets forth four grounds: (1) trial counsel's failure to obtain evidence regarding a confidential informant; (2) trial counsel's failure to challenge the indictment's omission of a penalty provision; (3) appellate counsel's alleged errors; and (4) failure of both trial and appellate counsel to communicate and provide court files and effective abandonment of the case by appellate counsel. See Doc. No. 125, pp. 5-8. On November 23, 2018, the Government filed a

response arguing that Ahumada's claims fail on the merits and that his petition should be dismissed. See Doc. No. 129. Ahumada filed a reply on January 29, 2019. See Doc. No. 132.

II. STANDARD OF REVIEW

"28 U.S.C. § 2255 provides a federal prisoner an avenue for relief if his 'sentence was imposed in violation of the Constitution or laws of the United States, or . . . was in excess of the maximum authorized by law.'" King v. United States, 595 F.3d 844, 852 (8th Cir. 2010) (quoting 28 U.S.C. § 2255(a)). This requires a showing of either constitutional or jurisdictional error, or a "fundamental defect" resulting in a "complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962). A 28 U.S.C. § 2255 motion is not a substitute for a direct appeal, and is not the proper way to complain about simple trial errors. Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1994). A 28 U.S.C. § 2255 movant "must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). Section 2255 is "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." Davis, 417 U.S. at 343.

A prisoner is entitled to an evidentiary hearing on a Section 2255 motion unless the motion, files, and records of the case conclusively show that the prisoner is not entitled to relief. 28 U.S.C. § 2255; Engelson v. United States, 86 F.3d 238, 240 (1995). A Section 2255 motion "may be dismissed without hearing if (1) movant's allegation, accepted as true, would not entitle the petitioner to relief, or (2) [the] allegations cannot be accepted as true because they are contradicted by the record, are inherently incredible, or are conclusions rather than statements of fact." See Winters v. United States, 716 F.3d 1098 (2013); see also, Holloway v. United States, 960 F.2d 1348, 1358 (8th

Cir. 1992) (a single, self-serving, self-contradicting statement is insufficient to render the motions, files and records of the case inconclusive); Smith v. United States, 618 F.2d 507, 510 (8th Cir. 1980) (mere statement of unsupported conclusions will not suffice to command a hearing).

III. LEGAL DISCUSSION

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. To be eligible for habeas relief based on ineffective assistance of counsel, a defendant must satisfy the two-part test announced in Strickland v. Washington, 466 U.S. 668, 687 (1984). First, a defendant must establish that defense counsel's representation was constitutionally deficient, which requires a showing that counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. This requires showing that counsel made errors so serious that defense counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Id. at 687-88. In considering whether this showing has been accomplished, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. If the underlying claim (i.e., the alleged deficient performance) would have been rejected, defense counsel's performance is not deficient. Carter v. Hopkins, 92 F.3d 666, 671 (8th Cir. 1996). Courts seek to "eliminate the distorting effects of hindsight" by examining defense counsel's performance from counsel's perspective at the time of the alleged error. Id.

Second, it must be demonstrated that defense counsel's performance prejudiced the defense. Strickland, 466 U.S. at 687. In other words, under this second prong, it must be proven that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." Wiggins v. Smith, 539 U.S. 510, 534 (2003). An increased prison term

may constitute prejudice under the *Strickland* standard. Glover v. United States, 531 U.S. 198, 203 (2001).

There is a strong presumption that defense counsel provided "adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690; Vogt v. United States, 88 F.3d 587, 592 (8th Cir. 1996). A court reviewing defense counsel's performance must make every effort to eliminate hindsight and second-guessing. Strickland, 466 U.S. at 689; Schumacher v. Hopkins, 83 F.3d 1034, 1036-37 (8th Cir. 1996). Under the *Strickland* standard, strategic decisions that are made after a thorough investigation of both the law and facts regarding plausible options are virtually unchallengeable. Strickland, 466 U.S. at 690.

When the defendant asserts that there are multiple deficiencies, each claim is reviewed independently. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006). There is no "cumulative error" rule applied to assistance of counsel claims. United States v. Robinson, 301 F.3d 923, 925 n.3 (8th Cir. 2002).

A. Evidence Concerning an Alleged Witness

In his first ground for relief, Ahumada asserts his trial counsel was ineffective in failing to argue the Government improperly withheld the identity of a confidential informant. Ahumada asserts that the information obtained from the confidential informant was used "to justify a traffic stop, and conduct a warrantless search of the vehicle." See doc. No. 125-7, p. 4. Ahumada further asserts that the "failure to produce this alleged witness, or any information thereof, could amount to a fraud upon the court(s), impeachment of [the law enforcement officer's] sworn Criminal Complaint affidavit, and pejured Grand Jury testimony." See id. The Government responds that the disclosure of information

regarding the informant would not have resulted in suppression of evidence because neither the traffic stop or Ahumada's vehicle, nor the search of the vehicle, were based upon any information provided by the informant. See Doc. No. 129, p. 8. The Government contends the stop was based on a traffic violation. See id.

Ahumada's trial counsel filed a motion to suppress the evidence obtained as a result of the traffic stop. See Doc. No. 36. The Court held a hearing on the motion and issued an order denying the motion. See Doc. Nos. 46 and 52. The Court's order set forth the following:

> The parties do not dispute that the initiation of the traffic stop was valid. The record supports the fact that [the law enforcement officer] had probable cause to initiate the traffic stop because the vehicle was traveling 64 miles per hour in a 60 mile per hour zone. [The law enforcement officer] testified that [Ahumada's co-defendant] exhibited nervousness, rapid speech, and continually cut [the law enforcement officer] off while he was speaking with him. [The law enforcement officer] deployed his K-9 drug dog, Max, who is certified to detect narcotics, to sniff the exterior of the vehicle. Max conducted a free air sniff of the vehicle and positively indicated on the vehicle for illegal drugs. Once Max alerted on the exterior of the vehicle, [the law enforcement officer] had probable cause to search the vehicles' interior without a warrant. See United States v. Bloomfield, 40 F.3d 910, 919 (8th Cir. 1994).
>
> The record demonstrates the dog sniff did not unreasonably prolong the traffic stop. The drug dog was located in [the law enforcement officer's] vehicle at the time of the traffic stop. The dog began sniffing the exterior fo the vehicle approximately 15 minutes after the initial stop was made. Applying binding Eighth Circuit precedent at the time of the traffic stop, the dog sniff did not violated Ahumada's Fourth Amendment rights. The Court finds [the law enforcement officer] objectively and reasonably relied on binding circuit precedent when he deployed his K-9 dog to detect narcotics in the defendant's rental case. Therefore, the exclusionary rule does not apply. See Davis v. United States, 131 S. Ct. at 24028-29; see also Givens, 763 F.3d at 992.
>
> Based on the totality of the evidence presented in this case and a careful review of the entire record, the Court finds [the law enforcement officer] conducted a lawful traffic stop which led to probable cause to conduct a search of the vehicle rented to Ahumada. Events that occurred during and after the traffic stop generated reasonable suspicion to justify further detention. The Court finds that Ahumada was not seized for an unreasonable length of time, and his Fourth Amendment rights were not violated during the traffic stop.

See Doc. No. 52, p. 5-6. The Eighth Circuit Court of Appeals came to the same conclusion when reviewing the traffic stop:

> There is no dispute that [the law enforcement officer] had probable cause to seize Ahumada and [his co-defendant] when he saw that the car was speeding on the highway. . . .
>
> The [law enforcement officer] testified that he received information from a reliable informant that Ahumada and [his co-defendant] sold heroin shortly before the traffic stop. The district court, however, made no findings of fact about the [law enforcement officer's] interaction with the informant, and it is unnecessary for us to address whether the trooper established probable cause or reasonable suspicion to make or extend a traffic stop.

United States v. Ahumada, 838 F.3d 1138, 1140 and n.2 (8th Cir. 2017).

Although not squarely on point with Ahumada's argument in his petition, the Court's ruling on the traffic stop and the Eighth Circuit's opinion affirming the ruling, is instructive. Even if the Court were to determine that Ahumada's counsel's failure to pursue the testimony of the confidential information fell below an objective standard of reasonableness, Ahumada has failed to demonstrate that he was prejudiced by counsel's performance. As both this Court and the Eighth Circuit found, the traffic stop was justified by the fact the vehicle was speeding. The information the law enforcement officer received from the confidential informant, truthful or otherwise, was supplanted by the fact the law enforcement officer had a separate valid justification for stopping the vehicle. Once the vehicle was justifiably stopped, the subsequent search was supported by the alert of the drug dog. The Court finds Ahumada has failed to establish that but for counsel's alleged unprofessional errors, the result of the proceedings would have been different. Accordingly, Ahumada is not entitled to relief on this ground.

B. Omission of Penalty Provision in Indictment

In his second ground for relief, Ahumada asserts his trial counsel was ineffective in failing to challenge the omission of a penalty provision in the indictment. See Doc. No. 125, p. 5. Ahumada further asserts that "it appears the Grand Jury indictment does not contain the requisite elevated penalty provision of the statute, pursuant to 21 U.S.C. § 840(a)(1), combined with § 841(b)(1)(A), § 841 (b)(1)(B), § 841(b)(1)(C), and § 841(b)(1)(D), to comport with due process of law. See Doc. No. 125-7, p. 6. The Government responds by arguing that the indictment was not defective and that Ahumada was clearly on notice as to the potential penalties. See Doc. No. 129, p. 16.

Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides that an indicment must contain " a plain, concise, and definite written statement of the essential elements constituting the offense charged" and that each count set forth the statute or other provision of law alleged to be violated. See Fed. R. Crim. P 7(c)(1). Rule 7(c)(2) also provides that "[u]less the defendant was misled and thereby prejudiced, neither an error in the citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction." See Fed. R. Crim. P 7(c)(2). "An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution." United States v. Carter, 270 F.3d 731, 736 (8th Cir. 2001). With respect to cases involving controlled substances, when the government seeks to increase the maximum and minimum statutory punishment based upon the drug quantity, the drug quantity becomes an essential element of the charge that must be charged in the indictment and proved beyond a reasonable doubt to a jury.

United States v. Webb, 545 F.3d 673, 677 (8th Cir. 208); United States v. Aguayo-Delgado, 200 F.3d 926, 934 (8th Cir. 2000).

The indictment states, in relevant part, as follows:

> COUNT ONE
> **Conspiracy to Possess with Intent to Distribute and Distribute a Controlled Substance**
>
> . . .
>
> From in or about November 2014 through the date of this Indictment, the exact dates unknown to the grand jury, in the District of North Dakota, and elsewhere, . . . CHARLES NMN AHUMADA did knowingly and intentionally combine, conspire, confederate, and agree together with other, both known and unknown to the grand jury, to possess with intent to distribute one kilogram or more of mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance, In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.
>
> . . .
>
> COUNT TWO
> **Possession with Intent to Distribute a Controlled Substance**
>
> . . .
>
> On or about December 29, 2014, in the District of North Dakota, . . . CHARLES NMN AHUMADA knowingly and intentionally possessed with intent to distribute one kilogram or more of a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance; In violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

See Doc. No. 1.

It is evident from the indictment that Ahumada was charged with two counts, each involving "one kilogram or more of a mixture and substance containing a detectable amount of heroin." Ahumada has provided no authority, nor has this Court been able to locate any, which requires the penalty provisions to be cited in an indictment or which states the failure to do so renders the indictment invalid or insufficient. In fact, the plain language of Rule 7 of the Federal Rules of Criminal Procedure provides just the opposite – that an error or omission does not create a ground

for dismiss or to reverse a conviction. Because Ahumada's assertion is contrary to well-established law, such claims cannot be a basis for alleging ineffective assistance of counsel.

In his petition, Ahumada also makes a passing reference to counsel's failure to object to the "Pre Sentence Report with it's use of the advisory Sentencing Guidelines, as was determined without the statutory sentencing provision of 21 U.S.C. § 841(a)(1) mandatory minimum/maximum statute" and argues that "[t]rial counsel had a Sixth Amendment Constitutional duty to effectively object, if the Pre Sentence Report calculated the advisory Guideline sentence, without the application of the mandatory minimum of the charge offnse." See Doc. No. 125, p. 5 and 125-7, p. 7.

It is unclear what Ahumada is attempting to assert. In any event, the record clearly establishes that the jury was instructed the drug quantity was an essential element of the crimes charged; that the jury found Ahumada guilty of both counts; and that the Presentence Investigation Report correctly calculated the base offense level using the correct drug quantity, as determined by the jury. See Doc. Nos. 64, 66, and 98, p. 7. Further, at trial Ahumada stipulated to the admission of a lab report that identified the quantity of heroin as 1800 grams (1.8 kilograms). See Doc. No. 69-2 (Government's Trial Exhibit 180 and Doc. No. 116 (Trial Transcript, p. 199). Any objection by trial counsel as to the drug quantity involved in this case would have been without merit, and thus cannot be the basis for an ineffective assistance of counsel claim. See Carter v. Hopkins, 92 F.3d 666, 671 (8th Cir. 1996).

Accordingly, the Court finds that Ahumada's claim of ineffective assistance of counsel as set forth in ground two of his petition are without merit. Ahumada is not entitled to relief on this claim.

C. Appellate Counsel's Alleged Errors

In his third ground for relief, Ahumada assets his appellate counsel erred by failing to advance the arguments or correct the errors of his trial counsel. Ahumada contends appellate counsel:

> failed to raise the discovery violation of the Government's alleged witness for possible fraud upon the court(s) and impeachment of the Criminal Complaint Affidavit and Grand Jury testimony concerning this alleged witness under plain error review. Failed to raise the indictment's omission of 21 U.S.C. § 841(b)(1)'s penalty provision under plain error review, and failed to raise the Pre Sentence Report's application of the advisory Sentencing Guidelines under plain error review, because of the indictment's failure to charge the penalty provision of the statute.

See Doc. No. 125, p. 7. The Government responds that these claims fail for the same reasons as Ahumada's claims against his trial counsel. The Court agrees.

As the Court found in relation to Ahumada's trial counsel, Ahumada is unable to establish that these claims have merit. Each fail as a matter of law as discussed in Sections A and B above. As to the claims regarding the confidential informant, Ahumada is unable to show prejudice because the traffic stop was supported by probable cause independent from the alleged information of the confidential informant. As to his claims of errors in the indictment or PSR, Ahumada's claims are contrary to the record and thus, cannot be the basis for a claim of ineffective assistance of counsel. Accordingly, the Court finds Ahumada has failed to establish that his appellate counsel's performance was ineffective for failing to raise any of these grounds on appeal. Ahumada is not entitled to relief on this claim.

D. Abandonment by Counsel

In his fourth and final ground for relief, Ahumada claims both his trial and appellate counsel failed to communicate with him and provide court files, which resulted in appellate counsel failing to file a petition for rehearing. Ahumada asserts:

> Numerous request were made to counsel to provide case information, provide court document(s) and case file, petition for rehearing/rehearing en banc, and petition for writ of certiorari to the Supreme Court . . . But counsel failed to respond, never withdrew from this case, and failed to provide requested court document(s) needed in preparation of this § 2255 motion, resulting into a total breakdown in the attorney/client relationship. The Eighth Circuit Court of Appeals, and the District Court have both electronically notified counsel of docketing activity, and counsel still failed to respond.

See Doc. No. 125, p. 8.

To the extent Ahumada contends counsel was ineffective for failing to provide documents needed for the preparation of his habeas petition, such allegation cannot serve as a basis for an ineffective assistance of counsel claim because there is neither a constitutional right nor statutory right to counsel in habeas proceedings. See Morris v. Dormire, 217 F.3d 556, 558 (8th Cir. 2000); United States v. Craycraft, 167 F.3d 451, 455 (8th Cir. 1999); Blair v. Armontrout, 916 F.2d 1310, 1332 (8th Cir. 1990); see also Boyd v. Groose, 4 F.3d 669, 671 (8th Cir. 1993) (explaining that a habeas corpus proceeding is a civil proceeding to which the Sixth Amendment right to counsel afforded for criminal proceedings does not apply). Thus, "[s]ince the right to effective assistance of counsel derives solely from the right to appellate counsel guaranteed by the right to due process . . . a litigant . . . without a constitutional right to counsel cannot 'be deprived of the effective assistance of counsel.'" See Steele v. United States, 518 F.3d 986, 988 (2008) (citing Wainwright v. Torna, 455 U.S. 586, 587-88 (1982); Simpson v. Norris, 490 F.3d 1029, 1033 (8th Cir. 2007)("where there is no constitutional right to counsel there can be no deprivation of effective assistance.").

The Court interprets Ahumada's remaining assertion in this ground as a claim that his counsel was ineffective for failing to communicate with him regarding the filing of a petition for rehearing and thus, deprived him of the opportunity to express his desire to file a petition for rehearing. The Court takes judicial notice that Ahumada's appellate counsel was appointed pursuant to the Criminal Justice Act of 1964. The record reveals the following chronology of events after the Eighth Circuit denied Ahumada's appeal, in an opinion filed June 5, 2017.

The same day the opinion was filed, June 5, 2017, the Eighth Circuit sent a letter to Ahumada and his counsel informing them of the opinion and the 14-day time period to request a rehearing. See Doc. No. 125-3, p. 10. By letter also dated June 5, 2017, but not postmarked until June 20, 2017, appellate counsel sent a letter to Ahumada, which stated, in relevant part:

> I am enclosing a copy of the decision of the 8th Circuit Court of Appeals on your case, together with the Judgment.
>
> You can file a Petition for Certiorari with the U.S. Supreme Court. Since I have never done one, you would need to contact the Clerk's Office in St. Louis, Missouri.

See Doc. No. 125-3, pp. 11-12. It is undisputed the letter was postmarked one day after the expiration of the 14-day period in which to file a petition for rehearing. Ahumada asserts he was in transit during this period. See Doc. No. 125-3, p. 2. Ahumada claims that he received the "rerouted" order and corresponding letter from the Eighth Circuit Court of Appeals on about June 27, 2017. See id. Ahumada further claims that he received the letter from his appellate counsel about June 29, 2017. See id. On July 1, 2017, Ahumada wrote to his attorney, raising concerns about the delay in receiving notice of the Eighth Circuit's decision, indicating his desire to seek rehearing, and requesting counsel file for rehearing. See Doc. No. 125-3, pp. 7-8. On July 6, 2017, Ahumada filed a *pro se* motion for a 14-day extension to file a petition for rehearing and rehearing *en banc*. See

Doc. No. 125-3, pp.1-13. The Eighth Circuit granted this motion, recalled its mandate, and extended the time to file the motion to July 19, 2017. See Doc. No. 125-5. Ahumada submitted a petition for rehearing and rehearing *en banc*, which was received and filed by the Eighth Circuit on July 25, 2017, after the July 19, 2017, deadline. See Doc. No. 129-1, p.1. The Eighth Circuit dismissed the petition for rehearing and rehearing *en banc* as untimely, on August 23, 2017. See Doc. No. 125-6.

The issue of whether failure to file or to communicate regarding the filing of a petition for rehearing constitutes ineffective assistance of counsel appears to be a matter of first impression in the Eighth Circuit. However, in the case of Steele v. United States, 518 F.3d 986 (8th Cir. 2008), the Eighth Circuit found a habeas petitioner did not have a constitutional right to counsel for the filing of a certiorari petition. The Eighth Circuit reasoned as follows:

> The right to counsel at trial is guaranteed by the Sixth Amendment, but the Fifth Amendment due process clause governs the right to counsel for appellate proceedings. See Ross v. Mofit, 417 U.S. 600, 610-11, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974); Scott v. United States, 473 F.3d 1262, 1264 (8th Cir. 2007). Due process guarantees a criminal defendant a constitutional right to counsel for her first appeal, Douglas v. California 372 U.S. 353, 357-58, 83 S.Ct. 841, 9 L.Ed.2d 811(1963), and that right encompasses the right to effective assistance of counsel, Evitts v. Lucery, 469 U.S. 387, 396-400, 105 S. Ct. 830, L.Ed.2d 821 (1985).
>
> Due process does *not*, however, guarantee a constitutional right to counsel for a litigant seeking to file a certiorari petition in the United States Supreme Court. Ross, 471 U.S. at 617-18, 94 S.Ct. 2437; see Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L.Ed.2d 539 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further."); see also 28 U.S.C. § 1254 (writ of certiorari is discretionary). Since the right to effective assistance of counsel derives solely from the right to appellate counsel guaranteed by the right to due process, Wainwright v. Torna, 455 U.S. 586, 587-88, 102 S.Ct. 1300, 71 L.Ed 2d 475 (1982), a litigant like Steele without a constitutional right to counsel cannot "be deprived of the effective assistance of counsel." Id. see also Simpson v. Norris, 490 F.3d 1029, 1033 (8th Cir. 2007) ("where there is no constitutional right to counsel there can be no deprivation of effective assistance."). In the absence of a constitutional right to the effective assistance of counsel Steele's § 2255 claims for ineffective assistance cannot succeed.

See Steele v. U.S. 518 F.3d 986, 988 (8th Cir. 2008). In reaching this decision, the Eighth Circuit also found that neither the Eighth Circuit's Criminal Justice Act Plan[1] nor Rule 44(a) of the Federal Rules of Criminal Procedure[2] are constitutional requirements, and thus, alleged violations of such cannot be the basis for an ineffective assistance of counsel claim. See id.

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[1] The Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964, provides:

> Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States*, 513 U.S. 5 (1994) (per curiam); 8th Cir. R. 35A.
>
> If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file *pro se* a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.
>
> If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.
>
> A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States. Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California*, 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing *pro se* a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petition for writ of certiorari.

Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964, https://ecf.ca8.uscourts.gov/newrules/coa/Plan_V_Revision.pdf.

[2]Rule 44(a) of the Federal Rules of Criminal Procedure provides: "A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceedings from initial appearance through appeal, unless the defendant waives this right."

> While our plan to implement the mandates of the Criminal Justice Act of 1964 may well embody the congressional judgment as to what representation to afford defendants, it is not a statement of what the Constitution requires. As in Finley, 481 U.S. at 553-59, 107 S.Ct. 1990, the source of the duty in our plan is a legislative policy judgment rather than a constitutional command. Similarly, the right created by Rule 44(a), which embodies a right to free counsel for indigent defendants, arises from rules of the Supreme Court promulgated pursuant to statutory authorization, not from a constitutional requirement. See 28 U.S.C. §§ 2071-77 (Rules Enabling Act). The alleged breach of the provisions of our plan and Rule 44(a) did not deprive Steele of due process of law and did not give rise to a claim for ineffective representation of counsel.

See Steele 518 F.3d at 988.

Two other circuit courts have directly addressed the issue and determined that criminal defendant do have a right to the continued representation of appointed counsel throughout the course of an appeal, including the filing of post-opinion pleadings. See Taylor v. United States, 822 F.3d 84 (2d Cir. 2016); United States v. Howell, 37 F.3d 1207 (7th Cir. 1994). In reaching their conclusions the Taylor court found the Criminal Justice Act "entitles defendants to representation in filing non-frivolous petitions for rehearing and rehearing *en banc*" and the Howell court found the Criminal Justice Act, Rule 44(a) of the Federal Rules of Criminal Procedure, and Circuit Rule 4 "make it clear that the defendant in a direct criminal appeal has the right to have the continued representation of appointed counsel throughout the course of the appeal, including the filing of post-opinion pleadings in the court of appeals." See Taylor, 822 F.3d at 89-90; Howell, 37 F.3d at 1209. These holding are distinguishable from the holding in the Eighth Circuit in Steele in that both the Second and Seventh Circuits relied upon authorities other than the Constitution, whereas the Eighth Circuit held a litigant without a constitutional right to counsel cannot be deprived of the effective assistance of counsel. See Steele 518 F.3d at 988.

Although it did not directly address the issue of petitions for rehearing, the Court finds the Steele case instructive. The Eighth Circuit has clearly held that, absent a constitutional right to counsel, no claim for ineffective assistance of counsel can succeed. Steele 518 F.3d at 988. The record clearly establishes that Ahumada's appellate counsel's performance did not adhere to the Eighth Circuit's CJA Plan. Appellate counsel's letter to Ahumada did not mention the process for filing a petition for rehearing. However, it is equally clear the Eighth Circuit does not consider its CJA Plan to create a constitutional right to counsel and, thus, a violation of its CJA Plan cannot be the basis for an ineffective assistance of counsel claim. See id. Following the reasoning in Steele, the Court finds that Ahumada has failed to establish that he has a constitutional right to counsel for the filing of a petition for rehearing or rehearing *en banc* and, thus, because he has no constitutional right to counsel for post-opinion pleadings, he likewise has no claim for ineffective assistance of counsel. Accordingly, the Court finds Ahumada is not entitled to relief on this claim.

IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties' filings, and the relevant case law. For the reasons set forth above, Ahumada's motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 125) is **DENIED**. The Court also issues the following **ORDER**:

1) Because the issue appears to be a matter of first impression in the Eighth Circuit, the Court issues a certificate of appealability on the limited issue of whether a criminal defendant has a right to counsel for the filing to a petition for rehearing or a petition *enbanc* because the dismissal of the motion is debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings.

2) The Court certifies that an appeal from the denial of this motion may be taken in forma pauperis.

IT IS SO ORDERED.

Dated this 20th day of November, 2019.

/s/ *Daniel L. Hovland*
Daniel L. Hovland, District Judge
United States District Court

Local 2255 Judgment (Rev. 6/16)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Charles Ahumada, Petitioner/Defendant v. United States of America Respondent/Plaintiff.	**JUDGMENT ON PETITION PURSUANT TO 28 U.S.C. § 2255** Criminal Case No. 1:15-cr-044 Civil Case No. 1:18-cv-183

IT IS ORDERED AND ADJUDGED that the Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 is dismissed, pursuant to the Order filed on November 20, 2019.

CLERK OF COURT

Date: November 20, 2019

/s/ Anja Miller, Deputy Clerk

Signature of Clerk or Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3632

Charles Ahumada

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:18-cv-00183-DLH)

JUDGMENT

Before COLLOTON, BENTON and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

April 22, 2021

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

18 U.S. Code § 3006A - Adequate representation of defendants

(a) CHOICE OF PLAN.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:

(1) Representation shall be provided for any financially eligible person who—

(A) is charged with a felony or a Class A misdemeanor;

(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

(C) is charged with a violation of probation;

(D) is under arrest, when such representation is required by law;

(E) is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;

(F) is subject to a mental condition hearing under chapter 313 of this title;

(G) is in custody as a material witness;

(H) is entitled to appointment of counsel under the sixth amendment to the Constitution;

(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel; or

(J) is entitled to the appointment of counsel under section 4109 of this title.

(2) Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who—

(A) is charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized; or

(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

(3) Private attorneys shall be appointed in a substantial proportion of the cases. Each plan may include, in addition to the provisions for private attorneys, either of the following or both:

(A) Attorneys furnished by a bar association or a legal aid agency,

(B) Attorneys furnished by a defender organization established in accordance with the provisions of subsection (g).

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

(b) APPOINTMENT OF COUNSEL.—
Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every case in which a person entitled to representation under a plan approved under subsection (a) appears without counsel, the United States magistrate judge or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate judge or the court shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(c) DURATION AND SUBSTITUTION OF APPOINTMENTS.—
A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate judge or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate judge or the court finds that the person is financially unable to pay counsel

whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate judge or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) PAYMENT FOR REPRESENTATION.—

(1) HOURLY RATE.—
Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $60 per hour for time expended in court or before a United States magistrate judge and $40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate judge and for time expended out of court. The Judicial Conference shall develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits. Not less than 3 years after the effective date of the Criminal Justice Act Revision of 1986, the Judicial Conference is authorized to raise the maximum hourly rates specified in this paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay under the General Schedule made pursuant to section 5305 of title 5 on or after such effective date. After the rates are raised under the preceding sentence, such maximum hourly rates may be raised at intervals of not less than 1 year each, up to the aggregate of the overall average percentages of such adjustments made since the last raise was made under this paragraph. Attorneys may be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court, and the costs of defending actions alleging malpractice of counsel in furnishing representational services under this section. No reimbursement for expenses in defending against malpractice claims shall be made if a judgment of malpractice is rendered against the counsel furnishing representational services under this section. The United States magistrate or the court shall make determinations relating to reimbursement of expenses under this paragraph.

(2) MAXIMUM AMOUNTS.—
For representation of a defendant before the United States magistrate judge or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not

exceed $7,000 for each attorney in a case in which one or more felonies are charged, and $2,000 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $5,000 for each attorney in each court. For representation of a petitioner in a non-capital habeas corpus proceeding, the compensation for each attorney shall not exceed the amount applicable to a felony in this paragraph for representation of a defendant before a judicial officer of the district court. For representation of such petitioner in an appellate court, the compensation for each attorney shall not exceed the amount applicable for representation of a defendant in an appellate court. For representation of an offender before the United States Parole Commission in a proceeding under section 4106A of this title, the compensation shall not exceed $1,500 for each attorney in each proceeding; for representation of an offender in an appeal from a determination of such Commission under such section, the compensation shall not exceed $5,000 for each attorney in each court. For any other representation required or authorized by this section, the compensation shall not exceed $1,500 for each attorney in each proceeding. The compensation maximum amounts provided in this paragraph shall increase simultaneously by the same percentage, rounded to the nearest multiple of $100, as the aggregate percentage increases in the maximum hourly compensation rate paid pursuant to paragraph (1) for time expended since the case maximum amounts were last adjusted.

(3) WAIVING MAXIMUM AMOUNTS.—
Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate judge if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(4) DISCLOSURE OF FEES.—

(A) In general.—
Subject to subparagraphs (B) through (E), the amounts paid under this subsection for services in any case shall be made available to the public by the court upon the court's approval of the payment.

(B) Pre-trial or trial in progress.—If a trial is in pre-trial status or still in progress and after considering the defendant's interests as set forth in subparagraph (D), the court shall—

(i) redact any detailed information on the payment voucher provided by defense counsel to justify the expenses to the court; and

(ii) make public only the amounts approved for payment to defense counsel by dividing those amounts into the following categories:

(I) Arraignment and or plea.

(II) Bail and detention hearings.

(III) Motions.

(IV) Hearings.

(V) Interviews and conferences.

(VI) Obtaining and reviewing records.

(VII) Legal research and brief writing.

(VIII) Travel time.

(IX) Investigative work.

(X) Experts.

(XI) Trial and appeals.

(XII) Other.

(C) Trial completed.—

(i) In general.—
If a request for payment is not submitted until after the completion of the trial and subject to consideration of the defendant's interests as set forth in subparagraph (D), the court shall make available to the public an unredacted copy of the expense voucher.

(ii) Protection of the rights of the defendant.—
If the court determines that defendant's interests as set forth in subparagraph (D) require a limited disclosure, the court shall disclose amounts as provided in subparagraph (B).

(D) Considerations.—The interests referred to in subparagraphs (B) and (C) are—

(i) to protect any person's 5th amendment right against self-incrimination;

(ii) to protect the defendant's 6th amendment rights to effective assistance of counsel;

(iii) the defendant's attorney-client privilege;

(iv) the work product privilege of the defendant's counsel;

(v) the safety of any person; and

(vi) any other interest that justice may require, except that the amount of the fees shall not be considered a reason justifying any limited disclosure under section 3006A(d)(4) of title 18, United States Code.

(E) Notice.—
The court shall provide reasonable notice of disclosure to the counsel of the defendant prior to the approval of the payments in order to allow the counsel to request redaction based on the considerations set forth in subparagraph (D). Upon completion of the trial, the court shall release unredacted copies of the vouchers provided by defense counsel to justify the expenses to the court. If there is an appeal, the court shall not release unredacted copies of the vouchers provided by defense counsel to justify the expenses to the court until such time as the appeals process is completed, unless the court determines that none of the defendant's interests set forth in subparagraph (D) will be compromised.

(F) Effective date.—
The amendment made by paragraph (4) shall become effective 60 days after enactment of this Act, will apply only to cases filed on or after the effective date, and shall be in effect for no longer than 24 months after the effective date.

(5) FILING CLAIMS.—
A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate judge and the court, and to each appellate court before which the attorney provided representation to the person involved. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate judge and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid

agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate judge, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate judge, the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

(6) NEW TRIALS.—
For purposes of compensation and other payments authorized by this section, an order by a court granting a new trial shall be deemed to initiate a new case.

(7) PROCEEDINGS BEFORE APPELLATE COURTS.—
If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

(e) SERVICES OTHER THAN COUNSEL.—

(1) UPON REQUEST.—
Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) WITHOUT PRIOR REQUEST.—

(A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $800 and expenses reasonably incurred.

(B) The court, or the United States magistrate judge (if the services were rendered in a case disposed of entirely before the United States magistrate judge), may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $800.

(3) MAXIMUM AMOUNTS.—
Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $2,400, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(4) DISCLOSURE OF FEES.—
The amounts paid under this subsection for services in any case shall be made available to the public.

(5) The dollar amounts provided in paragraphs (2) and (3) shall be adjusted simultaneously by an amount, rounded to the nearest multiple of $100, equal to the percentage of the cumulative adjustments taking effect under section 5303 of title 5 in the rates of pay under the General Schedule since the date the dollar amounts provided in paragraphs (2) and (3), respectively, were last enacted or adjusted by statute.

(f) RECEIPT OF OTHER PAYMENTS.—
Whenever the United States magistrate judge or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

(g) DEFENDER ORGANIZATION.—

(1) QUALIFICATIONS.—
A district or a part of a district in which at least two hundred persons annually require the appointment of counsel may establish a defender organization as provided for either under subparagraphs (A) or (B) of paragraph (2) of this subsection or both. Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. In the event that adjacent districts or parts of

districts are located in different circuits, the plan for furnishing representation shall be approved by the judicial council of each circuit.

(2) TYPES OF DEFENDER ORGANIZATIONS.—

(A) Federal Public Defender Organization.—
A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the court of appeals of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the court of appeals of the circuit for incompetency, misconduct in office, or neglect of duty. Upon the expiration of his term, a Federal Public Defender may, by a majority vote of the judges of the court of appeals, continue to perform the duties of his office until his successor is appointed, or until one year after the expiration of such Defender's term, whichever is earlier. The compensation of the Federal Public Defender shall be fixed by the court of appeals of the circuit at a rate not to exceed the compensation received by the United States attorney for the district where representation is furnished or, if two districts or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as may be approved by the court of appeals of the circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience in the Office of the United States attorney in the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities and financial position and its proposed budget. The Director of the Administrative Office shall submit, in accordance with section 605 of title 28, a budget for each organization for each fiscal year and shall out of the appropriations therefor make payments to and on behalf of each organization. Payments under this

subparagraph to an organization shall be in lieu of payments under subsection (d) or (e).

(B) Community Defender Organization.—A Community Defender Organization shall be a non-profit defense counsel service established and administered by any group authorized by the plan to provide representation. The organization shall be eligible to furnish attorneys and receive payments under this section if its bylaws are set forth in the plan of the district or districts in which it will serve. Each organization shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the next fiscal year. Upon application an organization may, to the extent approved by the Judicial Conference of the United States:

(i) receive an initial grant for expenses necessary to establish the organization; and

(ii) in lieu of payments under subsection (d) or (e), receive periodic sustaining grants to provide representation and other expenses pursuant to this section.

(3) MALPRACTICE AND NEGLIGENCE SUITS.—
The Director of the Administrative Office of the United States Courts shall, to the extent the Director considers appropriate, provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of a Federal Public Defender Organization established under this subsection, or a Community Defender Organization established under this subsection which is receiving periodic sustaining grants, for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malpractice or negligence of any such officer or employee in furnishing representational services under this section while acting within the scope of that person's office or employment.

(h) RULES AND REPORTS.—
Each district court and court of appeals of a circuit shall submit a report on the appointment of counsel within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation of plans formulated under this section.

(i) APPROPRIATIONS.—
There are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the

provisions of this section, including funds for the continuing education and training of persons providing representational services under this section. When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from such appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

(j) DISTRICTS INCLUDED.—
As used in this section, the term "district court" means each district court of the United States created by chapter 5 of title 28, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam.

(k) APPLICABILITY IN THE DISTRICT OF COLUMBIA.—
The provisions of this section shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this section shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.